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VIRGINIA:

IN THE CIRCUIT COURT OF CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA

v.

LEE BOYD MALVO

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CRIMINAL NOS. CR 03-3089,
CR 03-3090 & CR 03-3091

**COMMONWEALTH'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO PRECLUDE THE DEATH PENALTY ON THE BASIS
OF INTERNATIONAL LAW AND TREATIES**

The defendant has moved this Court to "preclude" the Commonwealth from seeking the death penalty against the defendant Malvo, on the grounds that such a disposition would be contrary to international law and the treaty obligations of the United States. Astoundingly, the thirty-three page Memorandum of Law filed by the defense team has omitted the many cases in both state and federal courts which have considered and uniformly rejected those arguments in the past.

- I. THE UNITED STATES SENATE FILED A RESERVATION TO ARTICLE 6(5) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (HEREINAFTER ICCPR) AND THE RESERVATION IS VALID.

Article 6(5) of the ICCPR prohibits the imposition of capital punishment for defendants under the age of eighteen years. The defendant's Memorandum of Law concedes, as it must, that the United States filed a reservation to Article 6(5) of the ICCPR, but argues that the reservation was invalid. The question of the validity of the Senate's reservation to Article 6(5) of the ICCPR has been considered many times by the highest state courts, as well as Federal

circuit courts, and the validity of the reservation has been upheld. See generally Dominquez v. Nevada, 961 P.2d 1279, 1280 (Nev. Sup.Ct.1998); Ex Parte Pressley, 770 So.2d 143, 148-149 (Ala. Sup.Ct.2000); Beazley v. Johnson, 242 F.3d. 248, 264-268 (5th Cir. 2001).

Despite these opinions, the defendant's Memorandum has recycled several of these rejected arguments to attack the validity of the Senate's reservation. For example, at page 4 of the Memorandum, defendant argues that Article 6(5) is essential to the purpose of the treaty, which is to "improve limitations on death penalty" and that, as a core principle of the document, no member state could effectively make a reservation to it. However, this "core principle" of the ICCPR is by no means apparent, since at least one court has found that the ICCPR does not limit the use of the death penalty by its members. See generally, Buell v. Mitchell, 274 F.3d. 337, 371-372 (6th Cir. 2001). At page 5, the Memorandum also suggests that the Senate bungled its own efforts to file a reservation to Article 6(5) because it failed to file a reservation to Article 4(2) of the same document. That notion was rejected by the Supreme Court of Alabama in Ex Parte Pressley, 770 So.2d. 143, 148 (2000). At pages 5-9, the Memorandum asserts that the Senate's reservation was a nullity because of certain findings by the United Nation Human Rights Commission (hereafter HRC). Findings by the HRC are relevant, the Memorandum continues, because the HRC was supposedly "designated to interpret" the ICCPR. Unfortunately, this argument has also been rejected by American courts. Beazley v. Johnson, 242 F.3d at 264-267 has found that the HRC has never ruled that the Senate's reservation was void, and went on to note that while the United States has acknowledged the HRC, it has never bound itself to HRC decisions. Beazley also observed that American courts which have occasionally considered HRC reasoning looked to the HRC for guidance only. See e.g., United States v. Benitez, 28 F. Supp. 2d. 1361, 1364(S.D. Fla 1998); United States v. Duarte-Acero, 208

F.3d 1282, 1287-1288 (11th Cir.2000). And while the Memorandum suggests at page 9 that the United States has entered into other international agreements restricting the state's lawful use of the death penalty, the 6th Circuit has found that the United States has not entered into any agreements that outlaw the states' statutory schemes for capital punishment. Buell, 274 F.3d at 372. The American judiciary has recognized the legitimacy of the United States Senate's reservation to the ICCPR in other jurisdictions. This jurisdiction should do the same.

II. THE ICCPR IS NOT SELF-EXECUTING AND THEREFORE THERE IS NO MECHANISM AT LAW TO IMPLEMENT ITS PROVISIONS.

The Memorandum also argues that the ICCPR is "self-executing." Memorandum, pp. 11-12. In fact, the Senate has declared that it is not. 138 Cong. Rec. S4781-01, S4787-84 (daily ed. April 2, 1992). Congress has never passed any implementing legislation to make the ICCPR self-executing, and no case has ever declared that the ICCPR was somehow self-executing without the benefit of implementing legislation. On the other hand, several cases have held that the ICCPR is not self-executing. See Buell, 274 F.3d at 372; Beazley, 248 F.3d at 267-268 (citing several cases holding the ICCPR not self-executing); Hain v. Gibson, 287 F.3d.1224, 1243 (10th Cir. 2002).

If a treaty is not self-executing, then there is no individual right of action. Ex Parte Pressley, 770 So. 2d. at 148n.3. Thus, even if this Court were to find that imposition of the death penalty violated the treaty, "a 'non-executing' agreement will not be given effect as law in the absence of necessary authority." Buell, 274 F.3d. at 372 citing Restatement (Third) of Foreign Relations Law § 111 (1987); Hain, 287 F. 3d. at 1243; see also Celestine v. Butler, 823 F.2d. 74, 79-80 (5th Cir.) cert. den. 783 U.S. 1036 (1987). Absent further action by Congress to incorporate its

terms into domestic law, the courts may not enforce them. See e.g. Jama v. INS, 22 F.Supp. 2d. 353, 365 (D. NJ 1998) cited with approval in Beazley, 242 F.3d. at 267.

III. THE PROHIBITION ON THE EXECUTION OF DEFENDANTS UNDER THE AGE OF EIGHTEEN YEARS IS NOT AN INTERNATIONAL NORM, NONDEROGABLE OR OTHERWISE.

Defendant's Memorandum argues that the prohibition on the execution of minor defendants has achieved the level of customary international law and international norm. *Id.* at pp. 13-23. The Memorandum then goes to argue that the prohibition is not only a norm but is a nonderogable norm, or jus cogens. *Id.* at 24.

Once again, American jurisprudence is aligned squarely against the defendants. Courts look to the peremptory norms of international law only when there is no treaty and no controlling executive or legislative act or judicial decision. See Gisbert v. U.S. Attorney General, 988 F. 2d. 1437, 1447 (5th Cir. 1993). In the case at bar, the norms of international law are not controlling because (1) the Senate had filed a valid reservation to the ICCPR and (2) in the case of Stanford v. Kentucky, 492 U.S. 361, 373-378 (1989) the United States Supreme Court upheld the execution of a sixteen year old defendant after finding no public consensus against the execution of sixteen and seventeen year olds. See Buell, 274 F.3d. at 373-376; Hain, 287 F.3d. at 1243-1244.

IV. THE UNITED STATES CONSTITUTION ENTRUSTED THE EXECUTIVE AND THE LEGISLATIVE BRANCHES WITH MATTERS INVOLVING THE RECOGNITION AND IMPLEMENTATION OF INTERNATIONAL LAW. THEREFORE, THE JUDICIARY SHOULD NOT RECOGNIZE CAUSES OF ACTION BASED SOLEY ON JUS COGENS.

Even if customary norms existed to support the defendant's position, American Courts have wisely refrained from blazing new trails in the wilderness of international norms and customs. Under our Constitution it is not the role of the judiciary to create remedies based solely on jus cogens. Rather, the means by which international norms may be implemented in this country are considerations properly left to the legislative and executive branches of government. See generally, Buell, 274 F.3d at 373-376; Hain, 287 F.3d. at 1243-1244.

CONCLUSION

For all the reasons mentioned above, and in light of the impressive body of American case law which have addressed these same issues over the years, the Court should deny the defendant's Motion to Preclude.

Respectfully submitted,

ROBERT F. HORAN
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Defendant's Motion was mailed, postage prepaid, and faxed to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 10th day of September, 2003.

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